In the High Court of Judicature at Madras

Dated:20.03.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.950 OF 1997

1. Amaresan
2. Thairiyalakshmi ..Appellants (Defendants)

v

Vaidyanathan ..Respondent (Plaintiff)

This second appeal is filed against the judgment and decree dated 11.7.1996 made in A.S.No.209 of 1993 on the file of Court of Principal Subordinate Judge,Cuddalore, confirming the decree and Judgment in O.S.No.368 of 1990 dated 17.09.1993 on the file of Court of District Munsif, Panruti.

For Appellants : Mr.M.Ilango
For Respondent : Mr.M.Kandasamy

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.209 of 1993 on the file of the Court of the Principal Subordinate Judge, Cuddalore. This appeal is against the concurrent findings of the Courts below preferred by the defendants in O.S.No.360 of 1990 on the file of the District Munsif's Court, Panruti.

2. The averments in the plaint in brief for the purpose of deciding this appeal sans irrelevant particulars are as follows: The plaint schedule properties are at Periyapagandai Village. Item No.1 to the plaint property is a lane with a measurement of 3 ½' x 65 ' in Village Natham Survey No.71/1. Item No.2 is the Punja land in Survey No.15/5 measuring 15 cents. The plaintiff's father Venugopal Gounder was having a plot measuring 26' east-west and 325' north-south in Survey No.71/1. On 10.7.1948, the plaintiff's uncle Varadaraja Gounder had purchased the above said plot from one Govindaraja Pillai and he was in possession and enjoyment of the said property. On 11.11.1948, the plaintiff's uncle had executed a sale deed in respect of the abovesaid plot measuring

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east-west 50' and north-south 325' in Survey No.71/1 in favour of the plaintiff's father. Thus, the plaintiff's father was in possession and enjoyment of the east-west 50' and north-south 325 ' in Survey No.71/1. The plaintiff's father was already in possession of 26' east-west and 325' north-west plot. There is a thatched house in the said plot and there was a partition entered into between the plaintiff's father and his sons viz., Vaidyanathan, Veerappan, Govindarajan,Ramachandran and Janakiraman. In the abovesaid partition, the plaintiff got east-west 10' and north-south 250' in the Survey No.71/1 and other brothers also got the same extent towards their respective shares. The plaintiff's younger brother Veerappan had executed a settlement deed on 3.8.1974 in respect of 10' x 250' in Survey No.71/1 got under the above said partition deed and also Item No.2 to the plaint schedule in favour of the plaintiff. Thus, the plaintiff became entitled to east- west 20' and north- south 250' plot in Item No.1. The plaintiff had constructed a terraced house in the abovesaid plot to the extent of 16 ½' x 250' out of 20' x 250' . Behind the said plot lies natham land and to reach the patta land, the plaintiff has left a lane measuring 3 ½' x 16 ½' in the 20' lane. The house of the plaintiff was constructed in the year 1974. From that onwards, the plaintiff is paying the house tax. The defendants are having their houses and plot measuring east-west 27' north-south 77' on the west of the above said plaintiff's pathway. North of the abovesaid plot, the defendants are having another plot measuring east-west 50' and north-south 119'. The abovesaid property originally belonged to Veerappa Gounder and his mother Pachaiammal. They have purchased those properties from one Chinnathu Chettiar on 15.11.1903. After the death of Veerappa Gounder and his mother Pachaiammal, Veerappa Gounder's son Ariyaputhri became entitled to the said property and after his death, Ariyaputhri's son Periyanna Gounder became entitled to the said property who had executed a sale deed in favour of the defendants on 10.7.1978. Even in the predecessors-in-title dated 5.11.1903, the predecesssors-in-title were entitled to only 27' east-west and 77' north-south in the said Survey Number property. The defendants and their predecessors-in-title were in possession and enjoyment of the plot measuring 27'x77' with a house. Apart from the above said measurement of 27' x 77', the defendants are not entitled to even 1 foot beyond the said measurement. But in the sale deed executed on 10.7.1978 in favour of the defendants, the east-west measurement has been wrongly mentionend as 33'. On that basis, they are trying to encroach upon plaint schedule Item No.1 which belongs to the plaintiff. The defendants are having access to their plot through a land belonging to Mariamman Temple situate behind the above said plot. Now the temple authorities have protected their land by barbed wire. Hence the defendants are making attempts to encroach upon the plaintiff's properties. The said attempt of the defendants in the first week of June, 1990 was

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successfully defeated by the timely intervention of the plaintiff. The defendants have no right or title over the above said lane. The patta has been issued in favour of the plaintiff in respect of the plaint schedule Item No.1. The plaint schedule Item No.2 was allotted to plaintiff's brother Veerappan in the partition deed dated 3.8.1974. The said Veerappan had executed a settlement deed on 3.8.1974 in favour of the plaintiff and from that date onwards, the plaintiff is in possession and enjoyment of the said Item No.2 to the plaint schedule. The defendants have no right or title in respect of Plaint Item No.2 The defendants are also making attempt to trespass into Item No.2 to the plaint schedule in the first week of June 1990. Hence the suit for declaration of the title and for injunction.

3. The second defendant adopted the written statement filed by the first defendant which runs as follows:
The partition deed dated 5.9.1964 is denied. The execution of the settlement deed dated 3.8.1974 is also denied as not true and not acted upon . While constructing his house, the plaintiff has never left the space measuring 16 ½' x 3 ½' on the western side. The lane between the plaintiff and the defendants' house is the absolute property of the defendant and it has been in exclusive possession and enjoyment of the plaint schedule Item No.1 property, the lane.. On 5.11.1903 one Veerappa Gounder and his mother Pachaiyammal purchased from Chinnathu Chettiar by a registered sale deed, the property to the extent of east-west 27' and north-south 77' of vacant site and small thatched house therein and vacant backyard to the extent of 50' east-west and 119' south-north. This extent of property had been in absolute possession and enjoyment of Veerappa Gounder and his mother Pachaiyammal. Subsequently, on 11.8.1943, Veerappa Gounder has purchased from Anai Gounder the vacant site next immediate east to his property purchased from Chinnathu Chettiar on 5.11.1903, for a total extent of 15'east-west and 275' south-north and a thatched house therin. Thus, by virtue of these two sale deeds, Veerappa Gounder had been in possession and enjoyment of 42' east-west and 276' south-north and two thatched houses therein.

3a) Even during 1940, Veerapa Gounder had orally donated the vacant site to the extent of 9' east-west and 57' south-north to the Mariamman Thuravupathi Ammal temple to park temple car and articles and for the village washerman who was living therein in the extreme western side. So Veerappa Gounder, though, had purchased 42' east-west and 57' south-north, after donation to the temple , he was in possession and enjoyment of remaining 33' x 57' in the front portion and 65' x 218' in the back portion. Subsequently, in the year 1950, Veerappa Gounder removed the two huts and leaving 3' breath of lane on the eastern side, constructed a brick build terraced house within the measurement of 33' x 75'

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and the remaining portion in the front and back of his house were enjoyed by Veerappa Gounder as garden. Veerappa Gounder had been enjoying as such till his life time and after his life time, his only son Aryaputhiri Gounder had been enjoying the same along with the vacant garden without any hindrance. After the life time of Aryaputhiri Gounder , his only son Periyanna Gounder has been enjoying the terraced house and the front and back portion vacant site absolutely without any interfeence in any manner. Right from the period of Veerappa Gounder till the period of his grand son Periyanna Gounder, the eastern side 3' lane had been in their absolute and exclusive possession and enjoyment.

3b) On 10.7.1978, this defendant has purchased the terraced house constructed within the measurement of 33' x 75' and the remaining backyard vacant site from Periyanna Gounder by a registered sale deed for a valuable consideration of Rs.10,000/- and taken possession immediately. By virtue of this sale deed inclusive of the eastern side land absolutely belongs to this defendant. Except this defendant no other person is having any manner of right whatsover in the suit lane. The plaintiff has no right or title in respect of the suit lane. The measurement given in the partition deed and the settlement deed are incorrect. If really, the plaintiff left 3 ½' of lane on the western side of his house, he could not have constructed his house with a breath of 20' east-west. Since 10.7.1978, this defendant is absolutely in possession and enjoyment of the suit lane and even prior to him his vendor have enjoyed for more than a statutory period and this defendant is having prescriptive title by adverse possession. Hence the suit is liable to be dismissed with costs.

4.. The first defendant has filed an additional written statement which was adopted by the second defendant as follows:
On the east of the suit item No.1, the plaintiff owns his house with the measurement, as shown by the Commissioner in his plan as 16 ¾' east-west. Next east of the plaintiff's house, plaintiff's brother Govindarajan is having his terraced house with a measurement of 8 ¼' on east-west. Next east, the plaintiff's another brother Ramachandran is having his terraced house for a measurement of 8¼' east-west and next to east is one Narayanasamy and his brother Algappan is having the vacant site with a breath of 8'9''. Only next to Narayasamy's vacant site, the last brother of the plaintiff Janakiram is having his Mangalore tiled house with a breath of 8'3'' east-west. Under such circumstances, from the house of the plaintiff till the house of his fourth brother Ramachandran, the total measurement east to west was only 42' and not 50' as avered by the plaintiff. Hence the plaintiff has constructed his house after 1974 in his share of 8 ½' and his settlement share of 8 ¼'. There is evidence to prove that each of his brother's of plaintiff owned 10'. The measurement of 10' to

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each of his brother is not correct and the measurement of the suit Item No.1 and the measurement of five brothers on the east of the suit land is not correct. Whereas this defendant has constructed a house in the year 1951. His vendor's father Ariputhiri Gounder leaving the suit lane to have his access to reach the backyard of his house. Hence the suit lane is the absolute property of the defendant. The suit item No.2 was originally belonged to Muthusamy Gounder, who had six sons by name Krishna Gounder, Venugopal Gounder, Ranganatha Gounder, Perumal Gounder, Govindasamy Gounder and Varatharaju Gounder. After the death of Muthusamy Gounder, all his six sons have made oral partition of their family properties in which each have taken 0.02 cents in the suit second item survey number. The plaintiff's father Venugopal Gounder was entitled to only 0.02cents. Thus, after the death of plaintiff's father and their sons are in possession and enjoyment of their respective shares and the defendant is entitled to 0.02 cents, in the suit second item. Likewise, the plaintiff and his brothers are jointly entitled to 0.02 cents in the suit second item, the plaintiff is not entitled to the entire extent of 0.12 cents in R.S.No.15/5 as claimed in the plaint. Hence the suit is liable to be dismissed.

5. The plaintiff has filed a reply statement denying the averments contained in the additional written statement.

6. On the above pleadings, the learned trial Judge has framed five issues for trial. The plaintiff has examined himself as P.W.1 besides examining P.W.2 Selvaraj and Exs A1 to A20 were exhibited. On the side of the defendants, the first defendant has examined himself as D.W.1 and Exs B1 to B3 were marked. A Commissioner was appointed in this case to note down the physical features and his reports are Exs C1 and C3 and plans are Exs C2 and C4.

7. After going through the available oral and documentary evidence let in by both sides, the learned trial Judge has come to a conclusion that the plaintiff is entitled to a decree for declaration and injunction in respect of plaint Item No.1 with a width of 3'.1" alone on the east-west direction, immediately on the west of the plaintiff's house and also decreed the suit in respect of Item No.2 to the plaint schedule as prayed for. In respect of the remaining extent in plaint Schedule Item No.1, the suit was dismissed by the trial Court. Aggrieved by the Judgement of the learned trial Judge, the defendants have preferred an appeal in A.S.No.209 of 1993 on the file of the Principal Subordinate Judge, Cuddalore. The learned first appellate Judge also concurred with the findings of the learned trial Judge, thereby dismissing the appeal preferred by the defendants which necessitated the defendants to come before this Court by way of second appeal.

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8. The substantial questions of law involved in this appeal are

> " 1. Whether the appellant is entitled to file additional documents which is relating to their plea made in the trial Court in the first appeal or not?
>
> 2. Whether the appellants and their predecessors perfected their title by adverse possession as they are in continuous possession and enjoyment of the suit property eversince 1903?
>
> 3. Whether the burden of proof lies on the plaintiff he who seeks verdict from the Court relating to the suit property which is admittedly in exclusive possession and enjoyment of the appellants herein?
> 4. Whether Ex B1 executed in 1903 itself is admissible as primary evidence as per the provisions of the Indian Evidence Act, 1872?

9. Heard Mr.M.Ilango, learned counsel appearing for the appellants and Mr. M.Kandasamy, learned counsel appearing for the respondent and considered their respective submissions.

10.The Points:

Even though the defendants have claimed that they have prescribed title to the plaint Item No.1 by way of adverse possession, they have not produced any document to show that they are in continuous and uninterrupted possession adverse to the interest of the plaintiff. Once the defendants claim the adverse possession , it indirectly mean that title vests with the plaintiff. On the basis of Ex B1 sale deed dated 5.11.1903, the defendants would contend that one Chinnathu Chettiar was entitled to the suit survey No.75 measuring 52 cents had conveyed the same under Ex B1 in favour of one Veerappa Gounder. The said Veerappa Gounder's son is Aryaputhiri Gounder,his son is Perianna Gounder and that one Anani Gounder had executed Ex B2 sale deed on 11.8.1943 in favour of Veerappa Gounder in respect of 88 cent in Survey No.748 and Perianna Gounder under Ex B3 sold 9 cents in Survey No.75/4 in favour of first and second defendants .

Ex B2 is in respect of survey No.128/1 Village Natham Poramboke. The property conveyed under Ex B2 is a building measuring 275' x 15'. Under Ex B3 a plot measuring 75' x 33' was conveyed by Periyanna Gounder in favour of defendants 1 and 2 in survey No.75/4 measuring 9 cents. Under Ex B1, Chinnathu Chettiar had executed the sale deed in respect of 52 cents in Survey No.75 in favour of

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Veerappa Gounder. There are two items of property conveyed under Ex B1. The second item is a plot measuring 50' x 119 '. The properties of defendants have been earmarked by the learned Commissioner in Ex C2 and C4 plans. Suit Item No.1, according to the plaintiff, is situate on the west of the plaintiff's house and the east of the defendants' house. Admittedly, the defendants are claiming only adverse possession to the plaint Item No.1 property.

11. Per contra, the defendants rely on Ex A1 dated 10.7.1948 sale deed executed by Govindaraja Pillai in favour of Varadharaja Gounder. The village natham survey number is 71/1. Varadharaja Gounder in turn had executed Ex A3 sale deed in respect of the property purchased by him under Ex A1 on 11.11.1948 in favour of Venugopal Gounder , the father of the plaintiff. So under Exs A1 and A3, the plaintiff claims that on the east-west measurement the property purchased under Ex A3 is 24'. The plaintiff would say that his house occupies only 20' . 4".on the north. The measurement on the east-west on the northern side 20'4" on the southern side 16'9" as seen in Ex C2 and Ex C4 Commissioner's plans. So immediately west of the plaintiff's house, lies the disputed lane which measures, according to the Commissioner in EX C2 report, 3'6" on the north and 3'4" in the middle and 3'1" on the southern extremity. If we add 3'6"with that of the measurement of plaintiff's house on the north ie., 20'4", the total length comes to 23'10" only whereas the plaintiff is entitled to 24' east-west as per Ex A3 sale deed. The measurement on the south for the plaintiff's house is only 16'9" towards east west. Measurement for the lane on the south is only 3'1".So if we add both the measurements , it will come to 19'10"on the south which is far below than the extent to which the plaintiff is entitled to under EX A3. The dispute with regard to the common passage measuring 3'6" east-west and 77' north-south, both the Courts below have come to a conclusion that the plaintiff is entitled to 3'1" width lane immediately west of the plaintiff's property. Even though the plaintiff is entitled to 3'6" on the basis of the measurement given under Ex A3, both the Courts below have declared that the plaintiff is entitleld to 3'1". There is no cross appeal preferred even before the first appellate Court.So under such circumstances, as far as Item No.1 of the plaint schedule is concerned, the Judgement of the lower appeallte Court is liable to be confirmed.

12. As far as Item No.2 in survey No.15/5 measuring 12 cents is concerned, there is no boundary given in the plaint schedule. The plaintiff claims under a partition deed Ex A4, Item No.6 to Ex A4 is Item No.2 to the plaint schedule ie., Survey No.15/5 measuring 12 cents . Even in Ex A4 partition deed, there is no masurements with four boundaries given for this item of property. Under such circumstances, even if a declaration is given in respect of Item No.2, it will only be a paper decree, unless it is

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identified with four boundaries . Even in Ex C2 and C4 plans, the learned Commissioner has not identified Item No.2 to the plaint schedule. Under such circumstances, I do not find any reason to give the relief in favour of the plaintiff in respect of Item No.2 to the plaint schedule.

13. The learned counsel appearing for the appellant would contend that he has filed a petition before the first appellate Court for receiving additional documents. But the first appellate Court has dismissed it. But there is no revision or appeal preferred against the order of the learned first appellate Judge in dismissal of the said petition. But as far as the claim of the defendants is concerned, they claim only title by way of adverse possession on the basis of EX A1 which is the sale deed in favour of Varadaraja Gounder who had executed Ex A3 in favour of Venugopal Gounder. But there is no scrap of papers produced by the defendants except Ex A1 to Ex A3 to show his possession in respect of Survey No.71/1 which is the suit item No.1. The learned counsel appearing for the appellant would represent that the additional documents are to be considered and the said submission cannot be hold any water in the second appeal because those additional documents are not before this Court . Points are answered accordingly.

14. In fine, the appeal is partly allowed, decree and Judgment in A.S.No.209 of 1993 on the file of the Principal Subordinate Judge, Cuddalore in respect of Item No.1 is confirmed and in respect of Item No.2, the first appellate Court's decree and Judgment is set aside and the suit in respect of Item No.2 is dismissed. Under such circumstances, the parties are to bear their own costs.

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Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Principal Subordinate Judge, Cuddalore.

2. The District Munsif, Panruti.

3. The Section Officer,
VR Section,
High Court, Madras.

Second Appeal No.950/1997

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